80-1300

NO.

MAY 13 1981

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LOUISIANA DEPARTMENT OF HIGHWAYS
STATE OF LOUISIANA, in personam,
and HOUSTON GENERAL INSURANCE CO.,
Defendants-Petitioners

versus

WINNIE OLA CRADOR AS EXECUTRIX OF THE
ESTATE OF HURBY CRADOR, ETC.,
Plaintiff-Respondent

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether Plaintiff was a Jones Act Seamen?

II. Whether the Lower Court errored by not allowing Evidence of Plaintiff-Respondent's Life Work History with the Highway Department.

III. Is the Plaintiff-Respondent's Claim for Releif under the Jones Act Barred by the Sovereign Immunity of the State of Louisiana, as Imposed by the Eleventh Amendment.

PRAYER

Plaintiff-Respondent prays that the Petition for Certiorari filed by Defendants-Petitioners for review of the judgment of the United States Court of Appeals for the Fifth Circuit entered on September 18, 1980, be denied.

OPINIONS BELOW

The judgment of the Court below is reported at 625 F. 2d 1227 (5th Cir. 1980), rehearing en banc denied, 632 F. 2d 894 (5th Cir. 1980). The amended judgment and the verdict of the jury.

GROUNDS FOR JURISDICTION

The Jones Act, 46 U.S.C. 688 (1975)

The General Maritime Law, 33 U.S.C. 905(b) (1978)

STATEMENT OF THE CASE

Hurby Crador, an employee of the Louisiana Department of Highways, State of Louisiana, sustained injuries of his back on May 21, 1975, while repairing or replacing a transmission aboard the Grand Lake Ferry. This ferry had been placed in this highway district for the purpose of transporting cars across the Intercoastal Waterway while repairs were being made on the permanent pontoon bridge. While Mr. Crador and his fellow employee, Mr. Pike, were repairing or replacing the transmission on the ferry, Mr. Crador injured his back.

Mr. Crador instituted this suit on May 2, 1976, and named as parties, defendants, Louisiana Department of Highways (hereinafter referred) to as Houston General), the liability insurer of the Highway Department. The suit was filed under the Jones Act, 46 U.S.C.A. s688, the General Maritime Law and in accordance with 33 U.S.C.A., Section 905 (b).

The Highway Department and Houston General filed an Answer and an Amended Answer to the complaint, denying any negligence, unsea worthiness of the vessel and denied that Mr. Crador was a seaman. The Answer and Amended Answer filed by Houston General and the Highway Department was a general denial of all factual allegations and an assertion of the affirmative defenses.

Defendants filed a Motion to Dismiss and/or for Summary Judgment on the grounds that the Lower Court lacked jurisdiction, because Mr. Crador lacked "seamen" status to sue under the Jones Act and the General Maritime Law. Judge Edwin F. Hunter, Jr. initially heard the Motion reserving to the Plaintiff the right to file for a rehearing. Rehearing was granted and the Motion was reheard on April 28, 1977 and a decision denying the Defendant's Motion on May 11, 1977. At the rehearing held on April 28, 1977, Judge Hunter correctly pointed out the issue of law presented, "There is no question

about that. I mean, the Court understands that. He wasn't a member of the crew of that vessel in the terms that he was permanently assigned to it. Of course, the Jones Act test uses the language of more or less permanently attached or did a substantial portion of his work aboard a vessel. And it uses the word or, O-R." "Now, the question for this Court to determine is whether this amounted to this man performing a substantial part of this work aboard a vessel or vessels belonging to the Highway Department, so as to make it a jury question." "The jurisprudence is replete and the Fifth Circuit has reviewed this matter over and over again within the last year but they continued to refuse to say what is a substantial portion of your time. In fact, they do not refuse to do so by omission, they merely state affirmatively we decline to say what is or is not a substantial portion."

Plaintiff must point out that Judge Hunter had before him when he ruled on the Motion all of the information with regard to passed life work history and the work history of Mr. Crador from the date of the arrival of the ferry, on

which he was hurt, until he was no longer able to work. In review of all this, Judge Hunter decided that the issue of "Status" should go to the Jury.

The case was set for trial on November 14, 1977. The jury trial was bifurcated to determine the issue of seamen status, apart from the question of liability and damages. The question of "status" was determined by the jury in favor of the Plaintiff.

At the conclusion of Plaintiff's case on liability and damages, Defendat made motions for directed verdict and partial directed verdict, then, again at the close of his defence, both of which were denied.

The case was submitted to the jury on November 17, 1977, and a verdict in favor of the Plaintiff was returned in the amount of $250,000.00. A judgment for that amount was entered in the Lower Court on that date. That judgment was amended on November 31, 1977.

On December 7, 1977, Defendants filed post-trial motion for Judgment N. O. V., Partial Judgment N. O. V., New Trial, Partial New Trial, and Remittitur. Briefs on these motions were filed by both Plaintiff and Defendant. The oral argument on the motions were heard by Judge Earl Veron on January 24, 1978, and said motions were denied.

Oral argument was presented to the Fifth Circuit panel consistion of Circuit Judges John R. Brown, Walter P. Gewin and Henry A. Politz. Following oral argument, the panel affirmed the rulings and judgment of the Lower Court in all respects, 625 F.2d (1980). Following the opinion of the Fifth Circuit panel, petitioners timely filed a Petition for Rehearing En Banc, which Petition was denied on November 3, 1980, 632 F2d 894 (5th Cir. 1980)

We are now before this Court by way of Petitioners timely Petition for Certiorari.

STATEMENT OF THE FACTS

SEAMEN STATUS

As a starting point the Plaintiff and Defendant stipulated that:

a) Defendant, Highway Department, was the owner and operator of the Grand Lake Ferry.

b) Plaintiff, Mr. Hurby Crador, was employed by the Highway Department as an Auto Mechanic II on May 21, 1975.

c) Mr. Crador did not sleep or eat on the Grand Lake Ferry.

d) None of the employees on the Grand Lake Ferry slept on the ferry.

e) The Grand Lake Ferry was located at Grand Lake on a temporary basis, as a mode of transportation across the Intercoastal Canal in as much as the permanent pontoon bridge was undergoing repairs, for at least the period from May 9, 1975 through August, 1975.

f) The Grand Lake Ferry was a vessel in navigation on the Intercoastal Canal in Louisiana when Mr. Crador was injured.

Mr. Crador had a permanent classification of Auto Mechanic II. As a result of his classification he was permanently assigned to work on ferries in the district on which Lake Charles and Cameron are located.

Considering only the time sheets introduced in P-I, the total time spent working on ferries from May 1, 1975 through May 21, 1975, was ninety-two hours on the Grand Lake Ferry.

After Mr. Crador returned to work on June 3, 1975, he worked until July 17, 1975, and during that period he spent seventy-nine (79) hours working on ferries of which seventy-five of the seventy-nine hours were spent on the Grand Lake Ferry.

The percentage of time spent working on the

Grand Lake Ferry during the periods setforth above, shows that Mr. Crador spent 46% of his time out of the available working hours, 376 hours, less 24 hours for sick leave, annual leave and one holiday or 352 hours.

Mr. Crador repaired ferries, bridges, trucks and cars, and spent so much time on the Grand Lake Ferry he could not off the top of his head give an estimate. He not only did repair to the engine on the Grand Lake Ferry but repaired the hudraulic pump, light plant, rams, changed spark plugs, and changed oil filters. It is clear from the testimony of Mr. Crador and Mr. Pike, a fellow employee, aht one of his primary duties was to work on the ferries in Lake Charles and Cameron area, due to the fact that he was on twenty-four hour call and was issued a life preserver as part of the equipment issued by his employer. Both Mr. Crador and Mr. Pike testified that they were instructed to "keep it

going", referring to the Grand Lake Ferry.

The facts as shown above by testimony and exhibits very clearly shows that Mr. Crador was more or less permanently assigned to a vessel or vessels and that he did a substantial part of his work aboard one of the vessels. It is also clear that he was doing work which aided the vessel in navigation while it was in navigation. The District Corut was asked by way of Motion for Summary Judgment to decide whether there was a jury question and it found in the affirmative.

REASONS FOR DENYING WRIT

The questions raised by Petitioners Writ have been answered by this Corut and the various Federal Courts of Appeal.

ARGUMENT

The District Court after hearing oral agrument on Motion for Summary Judgment granted Respondent time in which to present further evidence on the motions. After hearing all the tistimony and reviewing the affidavits filed by both Petitioners and Respondent, judgment was rendered denying Petitioner's motion.

Appellee feels it necessary to reiterate the facts of this particular case. Mr. Crador had been employed by the Highway Department for twenty years prior to his injury on May 21, 1975. The Grand Lake Ferry was located on the Intercoastal Canal from May 9, 1975 until August 1975. Prior to the date of Mr. Crador's injury, there were nine (9) scheduled working days, or seventy-two (72) hours of regular work time that Mr. Crador could have worked. It is clear that he worked seventy-seven (77) hours on the Grand Lake Ferry during that period. It is also clear that Mr. Crador during that same period

of time worked on other ferries in the Lake Charles-Cameron area. It is abundantly clear from both Petitioner's and Respondent's memorandum, affidavits and testimony at trial, that the Grand Lake Ferry was upon navigable waters, in navigation and Mr. Crador was aiding in its navigation.

The standard test for determining Jones Act Status is setforth in Offshore Company v. Robinson, 266 F2d 769 (5th Cir. 1959).

> "...there is an evidentiary basis for a Jones Act case to go to the Jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water, but designed to float on water), or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed

to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." 266 F.2d at 779 (Emphasis added).

This test was enlarged by the decision of this Court in Braniff v. Jackson Ave.-Grenta Ferry, Inc., 280 F.2d 523 (5 Cir. 1960), in that the Corut found "no insurmountable difficulty with respect to element (1) in the fact that such person is "Assigned permanently to" several specific vessels "or perform(s) a substantial part of his work on the "several specified "vessel(s)."

PERMANENT ASSIGNMENT

Mr. Crador was given the responsibility of keeping the ferries in the Lake Charles-Cameron area or Department of Highways, District 07, running. However, with the coming of the Grand Lake Ferry, which was a temporary mode of transportation brought in to replace a pontoon bridge, Mr. Crador became more or less permanently assigned to the Grand Lake Ferry. Mr. Crador and Mr. Pike testified that they were given orders to "keep it going". It is also abundantly clear that Mr. Crador did a substantial part of his work aboard and on the Grand Lake Ferry and all of the work contributed to the function of the vessel and the welfare of the vessel.

Of course, Petitioner would have the Court believe that Respondent fails the test set out in Robinson and Braniff, in that, the relation-

ship with the Grand Lake Ferry was spasmodic. The truth of the matter is that "We had orders not to tie it (Grand Lake Ferry) up unless it was completely demoloshed. I mean, it couldn't be run, otherwise, keep it rolling." The attachment to this ferry was not spasmodic and the relationship between Mr. Crador and vessel was substantial in point of time and work. Braniff B. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 528, (5 Cir. 1960)

The facts of the present case are easily distinguished from those in Rotolo v. Halliburton Company, 317 F.2d (5 Cir. 1963), Fazio v. Lykes Bros., S. S. Co., Inc., 567 F.2d 301 (1978), and Malkowitz v. Lykes Bros., S. S. Co, Inc.,(C.A. 70-3393, "I" E.D. La. 1972) aff'd per cur. 5th Cir. 1973. In all of the cases cited above, the Court refers to the fact that at no given time was Rotolo, Fazio or Malkowitz, either assigned to repair two or more boats, had not permanent connection of any type to any vessel or group of vessels; nor ever charged

with the duty of keeping a single boat in repair.

The present case presents the Court with a factual situation which shows that Mr. Crador was assigned to keeping the ferries (a group of vessels) in the District 07 area repaired and that he was specificially assigned the task of keeping one vessel going, the Grand Lake Ferry.

Furthermore, the Court is presented with a factual situation which clearly shows that Mr. Crador spent a substantial part of his work time on a vessel that was in navigation and the work performed was that which aided in its navigation.

It is Appellant's contention, as can be seen form the questions asked of Mr. Bass, the only witness called by the Petitioners, that because of the classification given Mr. Crador he would clearly be something other than a seamen. The fact that "...an employer hires men

to work on the water on vessels engaged in navigation and permits them to have such a permanent connection with the vessel as to expose them to the same hazards of marine service as those shared by all aboard should not be permitted by merely restricting their duties or by adapting particular nomenclature as descriptive of their task, to limit his liability to such employees, in the event of disability or death alleged to have been caused by the negligence of the employer, . . ."Wilkes v. Mississippi River Sand & Gravel Co., (6 Cir. 1953) 202 F.2d 383,388.

The statement by Judge Edwin F. Hunter, Jr., that, "There is no question about that. I mean, the Court understands that. He wasn't a member of the crew of that vessel in the terms that he was permanently assigned to it. Of course, the Jones Act test uses the language of more or less permanently attached or did a substantial

portion of his work aboard a vessel." (Emphasis added).

This clearly indicates that the "test of seamen status" is broader than Petitioner would have the Court think it to be, in that, Petitioner would have the Court to believe that only the pilot, 1st. and 2nd. mates, and those of "blue water" nature will be seamen. The facts of this case "are unique" as Judge Edwin F. Hunter, Jr. stated.

It is clear, however, that on the facts of this case, there was sufficient evidence for the case to go to the jury for the determination of whether Mr. Crador was a seamen.

SUBSTANTIAL WORK

The facts and evidence presented by way of testimony and exhibits clearly substantiates the Respondent's position that Mr. Crador performed a substantial part of this work on vessels and particularly the Grand Lake Ferry.

Respondent feels that the Court can of course, look at the cases cited by Appellant, ie. . . Holland v. Allied Structural Steel Company, Inc., 539 F.2d 476 (5 Cir. 1970); Brown v. ITT Rayonier, Inc., (5 Cir. 1974) 497 F.2d 234; Labit v. Carey Salt Co., 421 F.2d 1333; Keener v. Transworld Drilling Co., (5 Cir. 1972) 468 F.2d 729; Davis v. Hill Engineering, Inc., 459 F.2d 314 (5 Cir. 1974), but it is clear to Respondent that all of these cases do not present the same factual situation as found in the present case.

In Holland, you have a structual steel worker doing work on a bridge when he fell to

his death. There was no showing that injury arose out of service to the vessel or that he did a substantial part of this work on any vessel.

In Brown, it is clearly shown that he was assigned on one occasion to accompany another employee on a short trip in a 17 foot outboard motorboat. He certainly was not permanently assigned nor did he do a substantial part of his work on the vessel.

In Labit, the plaintiff was a worker loading salt by means of a conveyor belt and was not injured "upon navigable waters of the United States", in that he was standing on the dock when his injury occurred. 421 F.2d at 1334. The only connection with a vessel was the fact that Labit occassionally went aboard a power boat used to position vessels prior to loading. 421 F.2d at 1335.

In Keener, we have a worker on a fixed platform, who through a fortuitous occasion, electrical failure, spent three or four days scrapping paint and painting an engine room on the tender where he and the platform crew ate, slept, and spent off-duty time. 468 F.2d at 731. The Court in Keener correctly states the position of Appellee in the present case with regard to permanency:

> "Just as there can be no precise delineation of that quantum of duties which, when performed on board a vessel, will make the employee a seamen, similarly there is no bright-line test to be applied in determining the degree of frequency and regularity of performance which must be shown in order to claim status. However, more is required than the one isolated occurrence in this case. We do not hold that an employee must perform all

of his duties or even a greater part of them aboard the vessel in order to be considered a seamen." 468 F.2d at 732.

In Davis, the Court found that Davis was permanently assigned although he did not meet the other possible requirements, of doing a substantial portion of his work on a vessel or vessels. 549 F.2d at 326.

This Court has been hesitant to deny seamen's status on the basis of a wooden application of the permanency criterion because the test as been developed and applied in circumstances different from those found in the present case. This case presents a situation where a substantial part of man's work is spent on a particular vessel, he was more or less permanently assigned and he was doing work which aided the navigation of the vessel, while it was in navigation. Robinson, and the cases reviewed in that case, along with McKie v.

Diamond Marine Co., (5 Cir. 1953) 204 F.2d 132, have denied seamen's status to those accidents where you have land based worker providing land based services to docked vessels. This is of course, not the situation presented in the case before this Court.

EVIDENCE OF PAST WORK HISTORY

The District Court denied the Petitioner use of the work history of Mr. Crador for the two year period preceding the accident in question based on the objection of counsel for Respondent that it was totally irrelevant, due to the fact that the Grand Lake Ferry had not been in the Lake Charles area for that period of time. It should also be noted that there was no objection by Petitioner to the evidence presented in the District Court marked P-I (Work records of Mr. Crador from May 1, 1975 - May 21, 1975 and June 3, 1975 - July 17, 1975).

The question of past work history blends into the question of was Mr. Crador more of less permanently assigned to a vessel or vessels and "One is not likely to be permanently assigned to a vessel, or even to spend a substantial amount of time on a vessel such as

this ferry, unless it is in operation". (Judge Palitz opinion September 18, 1980). Citing Manchack v. S/S Overseas Progress, 524 F.2d 918 (5 Cir. 1975).

ELEVENTH AMENDMENT BAR TO SUIT JONES ACT SUIT BY RESPONDENT

In its Petition for Certiorari, the defendant-petitioner contends that "the federal courts lack the jurisdiction over petitioner based upon the immunity afforded by the Eleventh Amendment of the Constitution." Petition for Certiorari at 8-9.

The eleventh amendment states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Accordingly, although the eleventh amendment does not bare a citizen form suing his own state,

> it is established that an unconsenting State is ummine form suits brought in federal courts by her own citizens as well as by citizens of another state.

Employees of Department of Public Health & Welfare v. Missouri, 411 U.S. 279, 280 (1973).

In the present case, the Louisiana Highway Department, which owned the Grand Lake Ferry, was operating that ferry between May 9, 1975 and August 1975, as a temporary replacement for a permanent bridge which was them undergoing repairs. Therefore, the plaintiff-respondent contends that, the Highway Department, by operation said ferry, had entered into a federally-regulated shpere when the plaintiff was injured on May 21, 1975. Accordingly, the Highway Department had waived its sovereign immunity, and the Jones act, 46 U.S.C. § 688, provides a remedy to the plaintiff. This argument is supported by a series of federal cases. For example, in Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959), an interstate compact created the Tennessee-Missouri Bridge Commission and authorized it

to build a bridge and operate ferries across the Mississippi River. The p;aintiff administratrix brought an action under the Jones Act for wrongful death against the Commission for the death of an employee who was trapped in the pilothouse of the Commission's Ferry as it sank after colliding with another boat. The district court found that the defendant-Commission was an agency of the States of Missouri and Tennessee and therefore immune from suit in tort under the eleventh amendment. The Supreme Court, per Justice Douglas, reversed the Eighth Circuit's decision, which had affirmed the decision of the district court. The Supreme Court held that, where the Commission's charter gave it the power to sue and be sued, the states which were parties to the charter compact had waived their immunity from suit. Id. at 789-90.

In Parden v. Terminal Railway of Alabama State Docks Department, 377 U.S. 184 (1964), an employee brought a personal injury action pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 et seq. (1972), against the Terminal Railway, which was owned and operated by the State of Alabama through its State Docks Department. The State of Alabama moved to dismiss the action on the ground that the Terminal Railway was an agency of the state and the state had not waived its sovereign immunity form suit. The district court granted the motion to dismiss, which decision the Fifth Circuit affirmed. On appeal, the Supreme Court, per Justice Brennan, reversed.

In an argument similar to that raised by the petitioner here (see Petition for Cerliorari at 10-11), the State of Alabama contended in Parden that the question of "whether a State has waived

its immunity depends upon its intention and is a question of State law." Id. at 194 (citations omitted). As Justice Brennan asserted, however:

> Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere---whether it be interstate compacts or interstate commerce---subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law.

Id. at 196.

The Court, after concluding that the State Docks was indisputably a common carrier by railroad engaging in interstate commerce, stated:

> Our conclusion that this suit may be maintained is in accord with the common sense of this Nation's federalism. A

State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to the regulation as fully as if it were a private person or corporation. Cf. South Carolina v. United States, 199 U.S. 437, 463; New York v. United States, 326 U.S. 572. It would surprise our citizens, we think, to learn that petitioners, who in terms of the language and purposes of the FELA are on precisely the same footing as other railroad workers, must be denied the benefit of the Act simply because the railroad for which they work happens to be owned and operated by a State rather than a private corporation. It would be even more

surprising to learn that the FELA does make the Terminal Railway "liable" to petitioners, but, unfortunately, provides no means by which that liability may be enforced. Moreover, such a result would bear the seeds of a substantial impediment to the efficient working of our federalism. States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation. See South Carolina v. United States, supra, 199 U.S., at 454-455. In a significant and increasing number of instances, such regulation takes the form of authorization of lawsuits by private parties. To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal with respect to a substantial volume of regulable conduct. Where, as here, Congress by the terms and

purposes of its enactment has given no indication that it desires to be thus hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will.

Id. at 196-98 (footnotes omitted).

In Chesapeake Bay Bridge and Tunnel District v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968), a foreign shipowner brought an action for damages under 28 U.S.C. § 1333 (1966), against a state agency for damages sustained when the ship struck a submerged, hurricane-damaged tower in navagable waters. The Fourth Circuit, pwr Judge Bryan, held that a suit under section 1333 could be brought against the State of Virginia because her entry into interstate and foreign commerce, that is, an exclusive federal province, amounted to a waiver of sovereign immunity. As the court stated after noting the State of Virginia's argument that it was immune from suit under the eleventh amendment:

Nevertheless, libellant's replication must prevail---the State obstacle and the

Constitutional impediment are both waivable and they have been disclaimed. Virginia relinquished both of these pleas by seeking and obtaining admission into an exclusive Federal realm---interstate and foreign commerce. Art.I, Sec. 8, U.S. Constitution. Necessarily, the State recognized that she built in the Bay only by sufferance of the Federal government. This acknowledgment is conclusively evidenced by her petition for permission pursuant to the act of Congress, 33 U.S.C. section 401 et seq., to occupy navigable waters with bridges and tunnels. The supplication of the State, and her reception into the Federal domain, meant surrender, pro tanto and pro tempore, of State sovereignty and submission to the paramount overlordship of the United States during the tenancy.

Id. at 1003.

In Cocherl v. State of Alaska, 246 F. Supp. 328 (D. Alaska 1965), the plaintiff, and injured seaman, brought an action for damages against the defendant, the State of Alaska, under the general maritime laws of the United States as well as the Jones Act. The plaintiff alleged that he had sustained the injuries while employed as a seaman on the vessel Taku, which was owned and operated by the State of Alaska as a common carrier in the navigable waters. The defendant answered, contending that it was immune from suit by virtue of the eleventh amendment. The court, relying upon the Supreme Court's decisions in Petty v. Tennessee-Missouri Bridge Commission, supra, and Parden v. Terminal Railway of Alabama State Docks Department, supra, held that the State of Alaska's operation of the vessel as a common carrier in interstate commerce on navigable waters constituted a waiver of its sovereign immunity and consent to a suit brought in federal court by

the plaintiff seaman under the Jones Act. This consent did not extend, however, to a claim based upon general maritime law on unseaworthiness. As Judge Plummer stated:

> The pdicy behind Parden is identical with the policy supporting the same result in the case at bar. This policy is the safety and efficiency of employees in interstate commerce based on the concern for the efficiency of interstate commerce itself.
>
> The factual situation, the construction of the Jones Act and the identity of policy behind a waiver of immunity under the Federal Employers' Liability Act and the Jones Act prompt the court to adopt as controlling in this case the rationale of the Supreme Court in its decision in Parden.
>
> The Jones Act passes on to seamen all the modifications and extensions of common law rights and remedies made under statutes of the United States dealing with

personal injuries to railway employees. The Arizona v. Anelich, 298 U.S. 110,56 S.Ct. 707, 80 L.Ed. 1075 (1936). It left untouched old admiralty remedies for injured seamen and added a cause of action sounding in negligence. Its literal language, and that of the Federal Employers' Liability Act incorporated into it, all indicate the Jones Act is a negligence statute and that damages may be recovered only for negligence.

. . .

While holding that respondent, by its actions, has consented to a suit under the Jones Act, the court concludes that this consent does not extend to a claim based on general maritime law in unseaworthiness.

Id. at 330 (citations omitted).

In the present case, the State of Louisiana and its Highway Department have entered into a sphere of federally-regulated activity, that is,

operation the ferry as a common carrier in navigable waters. As a result, the state and the highway department have surrendered or waived their rights of sovereign immunity under the eleventh amendment. As Justice Brennan noted in Parden v. Terminal Railway of Alabama State Docks Department, supra, it would be inequitable for the plaintiff to be barred form a remedy under the Jones Act "simply because the vessel for which he worked happens to be owned and operated by a State rather than a provate corporation. 377 U.S. at 197. As a result, under the cases cited and discussed above, the entry by the defendant into the federally-regulated area of navigation by common carrier should be deemed to be a waiver of its sovereign immunity.

In a well-reasoned dissenting opinion in Intercoastal Transportation, Judge Wisdom of the Fifth Circuit contended that the court should follow the Fourth Circuit's decision in

Chesapeake Bay Bridge and Tunnel District v. Lauritzen, supra. Id. at 371. As Judge Wisdom stated:

> Applying this standard to the present case, I think it clear that Congress has lifted the states' veil of sovereign immunity. The Bridge Act of 1906, 33 U.S.C. § 491 et seq., establishes standards of care for the maintenance and operation of bridges over the navigable waters of the United States. In relevant part, it provides that draw bridges shall be opened promptly upon reasonable signal for the passage of boats or other watercraft, 33 U.S.C. § 494. The Act does not impose enormous fiscal burdens on the states as part of new pervasive scheme of federal regulation. Nor does it pose a threat to the harmony of our federal system by allowing recovery of double damages or invading an area traditionally reserved to

> the states . . . .The paramount purposes behind the Act demand that the states, who typically own the bridges involved, be made amenable to suits for enforcement of the statutory standards. This is true regardless whether the plaintiff is the United States or a private party injured by the violation of a statutory provision designed to protect him. Thus, there is no reason to presume that Congress did not intend to lift the states' immunity in all cases.

Id. at 370.

Under these circumstances, Judge Wisdom concluded:

> I would conclude, therefore, that the plaintiff's suit is not barred by sovereign immunity. The majority would require express statutory language that private enforcement remedies are applicable in suits against the states. To me, however, such a

> rule in contrary to the case law, to common sense, and to the usual presumption that whem Congress acts it is deemed to exercise its power to its utmost extent. Under the commerce clause, Congress had the authority to enact the present legislation. For the reasons previously stated, the Act should be construed as applying to private enforcement suits against the states. As the majority acknowledges, Georgia, by entering a federally regulated sphere of activity. waived whatever immunity it had at common law or under the eleventh amendment. There the matter should end.

Id.

One argument available to counsel in view of the foregoing is that the cases cited by Petitioner are not applicable to the present case on public policy ground. As Justice Stone stated with regard to the Jones Act:

> The legislation was remedial, for the benefit and protection of seamen who are peculiarly the ward of admiralty. Its purpose was to enlarge that protection, not to narrow it . . . . Its provisions, like others of the Merchant Marine Act, of which it is a part, are to be liberally construed to attain that end, ...

The Arizona v. Anelich, 298 U.S. 110, 123, rehearing denied, 298 U.S. 692 (1936) (citation omitted). By virtue of the Jones Act, Congress extended to seamen the remedies made available to railroad workers under the Federal Employers' Act. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). Accordingly, the Supreme Court's decision in Parden v. Terminal Railway of Alabama State Docks Department, supra, FELA case, is persuasive in the present case, as is Cocherl v. State of Alaska, supra, a Jones Act case, which held, in effect, that the employee plaintiff's right to sue the defendant state

under those statutes was of greater significance than the state's claim of sovereign immunity under the circumstances. Moreover, the federal circuit court cases cited above, see Williamson Towing Co., Inc. v. State of Illinois, supra; Intercoastal Transportation, Inc. v. Decatur County, Georgia, supra; and Red Star Towing & Transportation Co. v. Department of Transportation of New Jersey, supra, did not involve the FELA or the Jones Act. As a result, those cases lacked public policy reasons for upholding the plaintiff's right to maintain his cause of action. Here, such public policy factors are present and should be persuasive.

The Court must be aware of the fact that Usry v. Louisiana Department of Highways, 459 F. Supp. 56 (E.D. La. 1978) did not involve the issue of waiver of immunity with respect to a particular action. It is Respondents position that the Petitioners waived its Eleventh Amendment immunity as to this particular suit.

The Supreme Court in Edelman v. Jordan, 415 U.S. 651, 673, granting Murray v. Wilson Distilling Co., 213 U.S. 151, 171,29 S.C.T. 458, 464, 53 L. Ed. 742 (1909), stated:

> In deciding whether a State has waived its Constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Since the decistion in Edelman, several of the federal courts have rendered decisions that held that actions by representations of a state may constitute an effective waiver of the Eleventh Amendmant immunity with respect to a particular case. see Jordan v. Fusari, 496 F.2d 646 (2nd Cir. 1974) Gallagher v. Continental Insurance Company, 502 F.2d 827 (10th Cir. 1974) and Vargas v. Tainor, 508 F.2d 485 (7th Cir. 1974) cert. den., 420 U.S. 1008, 95 S. Ct. 1454, 43 L. Ed. 2d 767.

There is no state statute or constitutional provision known to the Respondent that would permit or deny the attorney for the state the right to waiver the State's immunity under the Eleventh Amendment. There is, however, in Louisiana law a very strong presumption that an attorney acts with the authority of his client. see Gaudet v. Lawes, 166 So.2d 337 (La. App. 1964). Respondent can see no reason for applying a different rule because an attorney represents the State.

The question of waiver of suit by one against the State in any other court has not been answered by the Louisiana State Courts, and the answer to why is obvious, but the question of waivering a jury trial under R.S. 13:5105 has been answered and in those cases the courts have held that when a state agency or political subdivision protected from a jury trial by R.S. 13:5105 proceeds to trial by jury, the right to object to jury trial is waived. Simmons v. Beauregard Parish School

Board, 315 So2d 883 (La. App. 1975) writ refused 320 So.2d 207 (1975). Callahan v. Town of Bunkie, 287 So.2d 629 (La. App. 1973).

CONCLUSION

Respondent respectfully prays that this Honorable Court deny the Writ of Certiorari to review the Judgment of the Fifth Circuit Court of Appeals.

Respondent subsits that the Department of Highways did and has waived its immunity provided by the Eleventh Amendment of the United States Constitution and thus the judgments of the Lower Court should be affirmed. It is further submitted that the Lower Courts had jurisdiction due to the fact that the State of Louisisna via the Louisiana Department of Highways was and does operate ferry boats in nabigable waters, the Petitioners have entered a federally-regulated sphere of activity and accordingly the Petitioners have waived their sovereign immunity rights and is, therefore, subject to the Respondent's Jones Act action in federal court.

Additionally, Respondent submits that the judgments of the Lower Courts with reference to the statute of Mr. Crador as a Jones Act seaman be affirmed and that no judgment be amended, reversed or remanded because of any evidenturary question related to Mr. Crador's work history, but that the judgments of all the Lower Courts be affirmed in toto.

Respectfully submitted,

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Attorney of record for
Winnie Ola Crador as
Executrix of the Estate
of Hurby Crador, Etc.

PROOF OF SERVICE

STATE OF LOUISIANA

PARISH OF CALCASIEU

BEFORE ME, the undersigned authority, personally came and appeared:

BILLY H. EZELL

who declared unto me, Notary, that he is the attorney for Plaintiff-Respondent herein and has applied for membership to the Bar of the Supreme Court of the United States, and hereby certified that on the _____ day of May, 1981, he served copies of the foregoing Petition for Certiorari on Defendant-Petitioners through their attorneys of record and on the Clerk of Court, United States Court of Appeals for the Fifth Circuit and the Clerk of the Supreme Court of the United States by mailing copies in duly addressed envelopes, with first class postage prepaid, as follows:

HEBERT & ABBOT

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CLERK OF COURT

FIFTH CIRCUIT COURT OF APPEALS

600 Camp Street

New Orleans, Louisiana 70130

CLERK OF COURT

SUPREME COURT OF THE UNITED STATES

One First Street N.E.

Washington, D.C. 20543

BILLY H. EZELL

SWORN TO AND SUBSCRIBED before me, this _____ day of May, 1981.

_____
NOTARY PUBLIC

APPENDIX A

46 U.S.C. § 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway emp;oyees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall

be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

APPENDIX B

33 U.S.C. § 905(b) Navigation and navigable waters

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damaged by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the emp;oyer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to

provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

As amended Oct. 27, 1972, Pub.L.92-576, § 18(a), 86 Stat. 1263.